

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

United States of America,)	
)	
Plaintiff,)	ORDER DENYING DEFENDANT’S
)	MOTION FOR LEAVE TO APPEAL
vs.)	
)	
Gabriel Martinez,)	Case No. 3:06-cr-14-17
)	
Defendant.)	

Before the Court is Defendant Gabriel Martinez’s “Application for Leave to Appeal in This Court of Appeals Pursuant to Fed. R. Crim. P. 52(b) Plain Error” filed on October 31, 2019. See Doc. No. 1596. Martinez seeks leave to file an appeal of his sentence, alleging that this Court plainly erred in calculating his total offense level under the United States Sentencing Guidelines.

On December 12, 2008, Martinez was sentenced to life imprisonment. See Doc. No. 1195. Martinez filed a timely notice of appeal. See Doc. No. 1199. On February 5, 2010, the Eighth Circuit affirmed his conviction and sentence. United States v. Martinez, 364 F. App’x 305 (8th Cir. 2010) (per curiam).

The Court will not grant Martinez leave to file an appeal. Martinez has already unsuccessfully appealed his case to the Eighth Circuit, and a defendant is not allowed to appeal his conviction or sentence twice. Martinez is also not seeking to appeal any of this Court’s orders denying post-conviction relief. Further, even if Martinez could appeal his original judgment a second time over a decade later, the Court finds that his appeal would be meritless. Martinez contends that the Court committed plain error when it calculated his total offense level as a 47 rather than a 43. See U.S.S.G. Ch. 5 Pt. A, n.2 (“In rare cases, a total offense level of . . . more than 43 may result from application of the guidelines. . . . An offense level of more than 43 is to be treated as an offense level of 43.”). However, the Guidelines range determined by the Court—

life imprisonment—was the same as it would have been with a finding of a total offense level of 43. Accordingly, the Court did not commit a plain error that “affected the defendant’s substantial rights” and “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” See Rosales-Mireles v. United States, 585 U.S. ___, 138 S. Ct. 1897, 1904 (2018) (quoting Molina-Martinez v. United States, 578 U.S. ___, 136 S. Ct. 1338, 1343 (2016)). Martinez’s motion for leave to appeal (Doc. No. 1596) is hereby **DENIED**.

IT IS SO ORDERED.

Dated this 5th day of November, 2019.

/s/ Peter D. Welte
Peter D. Welte, District Judge
United States District Court